

## OBSERVATIONS ON ANECDATA ABOUT COSTS IN AUSTRALIAN CONSTITUTIONAL CASES

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The topic of my paper, to which I readily acknowledge that I consented, was selected by Professor Patrick Keyzer. At the time of my consent, I perhaps did not give the matter as much thought as I should have.

The topic is premised upon there being some 'anecdotal' on the subject of costs in Australian constitutional cases. I am then asked to make observations on this anecdotal.

Upon further reflection, it seemed clear that my role was not only to comment on the anecdotal but also to produce it in the first place.

This led me to want to identify what is 'anecdotal'. I sought to answer this in the modern manner, by googling the word. A range of meanings were identified:

- a) 'information which is presented as if it is the result of serious research, but which is actually based on what someone thinks but cannot prove' – *Longman English Dictionary Online*;
- b) '(usually humorous or pejorative) anecdotal evidence' – *Wiktionary*; and
- c) 'a compilation of correlated stories or other single pieces of information produced to appear like actual scientific data.' – *Urban Dictionary*.

Following this research, I decided that this could be a fun topic. The next task was to collate and compile my information/stories so that I can present it in a manner that suggests that it is serious research and/or to look like actual scientific data.

### **My personal experiences**

Perhaps at the heart of any anecdotal, is information acquired personally. I decided to start here and to review the constitutional cases in which I had appeared and consider the nature of costs orders or considerations in those cases.

My process was to do a search on LexisNexis for all cases that had the word 'Constitution' in the catchwords, in which I was included as a representative of the

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parties. This resulted in 44 cases. I then reviewed these cases to prepare the following table:

	Cth	State	Other <sup>1</sup>
Party "successful" <sup>2</sup> overall	36	2	6
Party was "successful" <sup>3</sup> on the constitutional issue (such as it was)	31	3 <sup>4</sup>	9 <sup>5</sup>
	Yes	No	Not sought
Successful party obtained costs order <sup>6 7</sup>	38	2	3
	Impecunious	Financially substantial	"Middle class"

<sup>1</sup> Note some cases have more than one non-government party. Some have none.

<sup>2</sup> For the purposes of this entry 'successful' is defined as meaning 'got the orders sought'.

<sup>3</sup> In this instance, 'successful' means that the court upheld the party's position on the constitutional matter.

<sup>4</sup> This includes the decision in *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ('Pape'), which was decided contrary to Mr Pape's argument and also contrary to most of the Commonwealth's arguments. The State's arguments were also not totally accepted but they probably perceive themselves as the winner. Strictly speaking, the Commonwealth got the orders it sought.

<sup>5</sup> This includes *Wurridjal v The Commonwealth* (2009) 237 CLR 309, even though the Act was upheld as valid. As *Teori Tau v The Commonwealth* (1969) 119 CLR 564 was overturned, it was not a constitutional victory for the Commonwealth.

<sup>6</sup> In cases where the constitutional point arose on an interlocutory hearing, costs were generally ordered to be "costs in the cause" (as with all other litigation). I do not include this category as either yes or no.

<sup>7</sup> I have not sought to adjust this where the case was overturned on appeal.

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<b>Non-government party<sup>8</sup></b>	28 <sup>9</sup>	8	7 <sup>10</sup>
	<b>Counsel/ Solicitor</b>	<b>Senior Counsel</b>	<b>Unrepresented</b>
<b>Non-government party represented by:</b>	41	25	2
	<b>High Ct</b>	<b>FCA &amp; FCAFC</b>	<b>Other</b>
<b>Forum</b>	15	27	2

My review of the cases also highlighted the following particular factors or issues:

- a) In some cases, the Commonwealth chose not to seek costs orders, even when successful, if the other party was impecunious or belonged to the middle class.
- b) Where the Commonwealth was successful against companies with substantial financial backing, the Commonwealth always sought costs.
- c) The only cases where a middle class person was involved were criminal cases or derived therefrom.
- d) In some of the matters, the reference to constitution was fairly peripheral to the real issues of the case. However, to maintain the pseudo-science of this paper, I have left them in the statistics (this avoids my having to assess the extent/degree to which the cases were “constitutional” on some imaginary scale). (That said, I can say that 10 of the cases have only very minor references to the Constitution).

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<sup>8</sup> Note some cases have more than one non-government party. Note that some cases have no non-government parties.

<sup>9</sup> This includes the NSW Council for Civil Liberties Inc.

<sup>10</sup> This includes the plaintiffs in *Combet v Commonwealth* (2005) 224 CLR 494 and *Pape*, as well as the plaintiffs in three military justice cases.

e) Where a State or the Commonwealth intervenes in a case under s 78B of the *Judiciary Act 1903* (Cth), it has been my experience that they do not seek costs and generally resist paying costs.

In *Bodruddaza*,<sup>11</sup> the substantive matter involved the construction of one aspect of the *Migration Regulations 1994* (Cth). There was a preliminary matter as to the effectiveness of time limits imposed on the High Court's jurisdiction, which was the subject of a successful constitutional challenge. The Court ordered the Commonwealth to pay the costs of the plaintiff in respect of the constitutional matter and plaintiff to pay the costs of the Commonwealth in respect of the matter under the migration regulations. I vaguely recall that it was agreed that the Commonwealth would pay around 90-95% of the costs of the plaintiff, given the relative amount of work involved in the two matters.

In *Soh v Commonwealth of Australia*,<sup>12</sup> Madgwick J determined an application by the Commonwealth for security for costs from an applicant seeking damages who also challenged the validity of a Commonwealth law, which applicant was resident in Korea. One public interest factor relied upon by the applicant for not requiring a security for costs was the fact that there was a constitutional challenge. Notwithstanding this, his Honour considered that it would be appropriate to make an order for security of costs. (Ultimately, no such order was made because his Honour considered that there was insufficient evidence about the additional cost of enforcing a cost order in South Korea).

In *Plaintiff S157/2002 v Commonwealth of Australia*,<sup>13</sup> the plaintiff sought relief that would hold the privative clause contained in the *Migration Act 1958* (Cth) to be invalid. This relief was not granted. The provision was held to be valid, albeit largely (if not completely) ineffective. When the decision was handed down, the Minister issued a press release which claimed victory because the Act was upheld. The press ran stories accepting this interpretation of the case. I recall the solicitor for the plaintiff telling me that it took him two days to persuade the press that the plaintiff had won the case. The court had answered a question about who had to pay costs in the following manner:

The Commonwealth should pay 75% of the costs of the plaintiff of the proceeding.

Apart from providing some remuneration to the plaintiff's legal representatives, this order also allowed the plaintiff's solicitor to persuade members of the press that the

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<sup>11</sup> *Bodruddaza v MIMA* (2006) 228 CLR 651.

<sup>12</sup> (2006) 231 ALR 495.

<sup>13</sup> (2003) 211 CLR 476.

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Minister had in fact lost the case. Of course, by this time, it was no longer newsworthy and the 'corrections' were buried deep in the papers.

### **Observations on the anecdota**

It is not really possible to draw inference about matters that have not been litigated from matters that have been litigated (my table above concerning only matters that have been litigated).

Nonetheless, it may be observed that the above anecdota reveals that some impecunious litigants are able to obtain representation in constitutional cases. Indeed, many (about 12 of 27) were able to obtain senior counsel to represent them.

The normal costs rule has generally one of two outcomes: if successful, your representatives' costs (or a portion of them) will be paid for; if unsuccessful, you will need to pay the other side's costs (assuming your representatives are working on a speculative basis).

This rule is not particularly problematic for the impecunious. They often have little fear of an adverse costs order as they will not be paying it anyway. More importantly, it is relatively easy, for a person who has a case with some prospects of success, to find legal representatives who will represent the person on a speculative basis. In this way, the current costs rule supports the availability of legal representation to persons with little or no money who have a case with some prospects of success.

The position is somewhat different for a middle class person with a similar prospect of success. Such a person probably has the same ability to entice lawyers to act for them on a speculative basis (or possibly a bit less because lawyers might think that the person should make some financial contribution). However, a middle class person stands to lose a substantial sum if his or her case is unsuccessful (presumably, such a person would have some assets that can actually be lost to a costs order). Even if he or she has lawyers working on a speculative basis, he or she will still have to pay the respondent's legal costs, which may well be very substantial.

In the cases that I have considered above, I have identified seven 'middle class' plaintiffs who brought proceedings. One was Mr Greg Combet. I expect that his costs were always to be covered by the union movement. So, he does not really count in this context.

Three of the seven were members of the Australian Defence Force facing charges under discipline legislation and challenging the validity of that legislation. They were often facing serious charges or charges with serious financial consequences, such that they were prepared to take risks as to costs. Another was a plaintiff challenging a

search warrant (and related legislation): similar motivations were held by that person.

The sixth person was someone who had been deregistered or who faced deregistration from her professional body, giving her a significant financial imperative to take the risk of pursuing the litigation.

The only person in this group who had a lot more to lose than to gain was Mr Pape. He seems to have been motivated by intellectual considerations. This places him in a fairly unique category. He was also seeking relief to *prevent* the Commonwealth from giving him money. This is also not a common area of litigation. So, Mr Pape is exceptional in a number of regards.

I would infer that the current costs rule probably does have a significant impact on the level of litigation from middle class persons. This is not limited to constitutional litigation.

If anything it may be that the deterrent effect of the costs rule on constitutional litigation is less than in other areas. Insofar as constitutional cases involve a challenge to legislation and insofar as legislation usually has a general impact, there is often a range of potential plaintiffs for any piece of legislation that could be challenged. In this situation, one would expect that the number of potential plaintiffs makes it more rather than less likely that constitutional issues will be pursued by someone.

The table above does not say how often the Commonwealth sought to recover costs under a costs order, in particular from impecunious and middle class plaintiffs. Generally, the head of agencies will be under a duty to recover debts to the Commonwealth under the *Financial Management and Accountability Act 1997* (Cth). I would expect, therefore, that some effort would generally be made to moreover debts created by cost orders.

Finally, I should say something further about the cases in which costs were not sought or not obtained by the successful party.

One such case was an interlocutory matter in the *SportsBet s 92* litigation. The costs in that interlocutory matter were inconsequential and the successful party (SportsBet) I think concluded that the fight about costs was not worth the effort.

In *Pape*, the plaintiff and the Commonwealth reached agreement before the end of the hearing that neither party would seek an order for costs if successful.

In *New South Wales Council for Civil Liberties Inc v Classification Review Board (No. 2)*,<sup>14</sup> the court made no order as to costs as agreed between the parties. My vague

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<sup>14</sup> (2007) 241 ALR 564.

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recollection is that the successful respondent chose not to seek an order for costs in relation to litigation that the appellant had pursued solely in its (the appellant's) view of the public interest.

As noted above, in *Bodruddaza*, the court ordered that costs be paid by the party successful on the individual issues. The net result was that, although unable to achieve any of the substantive orders sought, Mr Bodruddaza was able to have most of his costs paid by the Commonwealth.

In *Plaintiff S157*, the answers to all of the questions concerning substantive issues were not those sought by the plaintiff. Nonetheless, the plaintiff had a 75% cost order on the basis that the reasoning of the court substantially favoured him.

### **Other matters**

The topic of costs in constitutional cases is shared between Professor Patrick Keyzer and myself. Professor Keyzer sent me draft chapters of a book he is writing on constitutional access to justice. This material discusses in some considerable detail the law and practice relating to costs in constitutional cases. I assume that his presentation will cover this material and I do not propose to cover that material.

One aspect of the subject of costs that I did not see covered concerned when a respondent could seek an order for security for costs in a constitutional case.

I noted above that this question arose in *Soh*. In that matter, Madgwick J did not see that the existence of a constitutional argument precluded the making of such an order. Perhaps I should note that it is very often the case that constitutional issues do not arise in cases by themselves; that is there are cases with many issues one or more of which may be constitutional. If one were to posit that there should be special rules as to standing or costs in 'constitutional cases', a question would arise as to when a case became a constitutional case. How central does the constitutional point need to be?

The question of security for costs in the High Court was considered by Kirby J in *Merribee Pastoral Industries Pty Ltd v ANZ Banking Group Ltd*.<sup>15</sup> His Honour summarised some of the key principles applicable to when an order for security for costs should be made as follows:

1. There is no absolute rule to control the exercise of the discretion to order security for costs where that jurisdiction derives from the inherent power of the Court. The jurisdiction, as one reposed in a court, is to be exercised judicially and for the purpose for which it exists. An analogous discretion has been described as

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<sup>15</sup> (1998) 193 CLR 502.

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'absolute'. It would be wrong to attempt to hedge the jurisdiction about by rules or practices, even where derived from a number of instances. This is because what should be done in each case depends entirely on the circumstances of the case. The governing consideration is what is required by the justice of the matter.

2. There is therefore no absolute rule (applicable statute apart) that the impecuniosity of a party will entitle its opponent to an order for security for its costs. Where the power to so provide exists in uncontrolled terms, it would be to fetter the jurisdiction impermissibly to adopt such a rule or even a prima facie entitlement. By the same token, the inability of a party to meet the costs of an unsuccessful proceeding is not irrelevant to the exercise of the jurisdiction. Litigation is inevitably expensive and burdensome. To add to the burdens of a party successful in the outcome, those of paying its costs with little or no prospect of recovery under an order for costs may, in particular circumstances, be a reason for offering a measure of protection to that party by way of security for costs.

3. Another consideration that has sometimes been judged to be relevant is the strength of the case of the party resisting an order that it provide security for costs and an evaluation (necessarily tentative) of its prospects of success. Thus, the fact that a party has secured special leave to argue its case on appeal has been thought a relevant consideration in some circumstances. Similarly, if a proceeding appeared hopeless and such as was bound to fail, the lack of apparent merit in a party's case might be a reason for ordering it to provide security for the costs to which, it appears, it is needlessly putting its opponent. Such a consideration would need to be exercised with care, given that the real merits of a case might not emerge until the final hearing or might not sufficiently emerge in the necessarily brief proceedings typically involved in an application for security for costs. Furthermore, if a party asserts that its opponent's proceedings are manifestly lacking in legal merit, other remedies are available to it to protect it from needless vexation. In appeals there is the barrier of leave or special leave.

4. Further considerations which, in the particular circumstances of the case, have been held relevant to the grant or refusal of an order for security for costs in relation to a proceeding in the Court have been:

- (a) That the hearing of the proceeding is close at hand or that the moving party has delayed its application for such an order.
- (b) That the parties or some of them are legally aided.
- (c) **That the proceeding raises matters of general public importance quite apart from the interests of the parties.**
- (d) That the nature of the proceeding is such that, even if unsuccessful, an order for costs in favour of the winning party might not be made or might be limited.



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- (e) That the costs orders made earlier in the proceedings have followed an unusual course or have involved countervailing orders which must be weighed against those liable to be made in the proceedings in question.
- (f) That a party to the proceedings is, or will at judgment be, or be likely to be, absent from the jurisdiction and has no or few assets within the jurisdiction.
- (g) That if an order were made it would effectively shut a party out of relief according to law in circumstances where that party's impecuniosity is itself a matter which the litigation may help to cure.

Doubtless there are as many further considerations as there are cases. The foregoing help to illustrate some of the matters which courts, including this Court, have felt to be relevant to the exercise of the discretion to order security for costs, where that discretion is invoked. [Citations omitted. Emphasis added.]

Justice Kirby then went on to apply these principles in the following manner:

[31] Although I regard the case as finely balanced, I have ultimately concluded that security for costs should not be ordered. I take into account the admitted impecuniosity of the plaintiffs and the long course of the litigation in which the parties have been embroiled. I do not feel able to draw any inferences, in the evidence before me, that external funding of the litigation exists which would be likely to continue were security for costs to be ordered. **The consideration critical to my decision is the obvious importance to the plaintiffs, and also to the public, of an early resolution of the constitutional questions left without effective answer by the decision of the Court in *Gould v Brown*.** Those questions are bound to arise soon. In a case where cross-vested jurisdiction was assumed by the Federal Court, pursuant to the special scheme relating to corporations, it is likely to arise in a case such as the present where a corporation, despite its objections to jurisdiction, has been wound up.

[32] **I would not be inclined to put in the way of the resolution of this important constitutional question which the plaintiffs are equipped and wish to argue against the Bank, an impediment requiring them to provide security for the costs of the Bank.** Given that they admit to insolvency, such an order might effectively bar their access to this Court and to its resolution of the application of the Constitution which they invoke. As it seems to me, it is desirable that the challenge which they bring should be resolved quickly so that the many proceedings under way in courts throughout this country are relieved of the uncertainty which has been produced by the present state of authority, or lack thereof.

[33] Having come to this conclusion, it is unnecessary for me to consider various other arguments which the plaintiffs pressed upon me. [Emphasis added.]

It may be seen that litigation concerning important constitutional issues has already been recognised as deserving special consideration when it comes to the availability

of orders for security of costs. I do not suggest that it is entirely outside the normal principles but that it is a recognised case of public importance. The law thus is already disposed to facilitate access to the courts in relation to constitutional cases; at least to the extent that it is harder to obtain a security for costs (which can itself be a bar to a plaintiff or appellant who is impecunious).

This approach was recently applied in *Tran v Commonwealth*,<sup>16</sup> where the Commonwealth's application for a security for costs was dismissed. The case concerned a challenge under s 51(xxxi) to provisions of the *Migration Act 1958* (Cth) and the *Customs Act 1901* (Cth) pertaining to forfeiture of a ship.

While this concerns only one small area of the question of access to constitutional justice, it reveals that the existing law has already developed in a manner that tends to preserve access where there is a constitutional argument that is to some extent meritorious.

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<sup>16</sup> (2010) 111 ALD 111.